33. UNIT DETERMINATION CRITERIA

33.1: Board of Personnel Appeals' Authority [See also 01.24.]

The Board of Personnel Appeals does not have the authority to alter existing unit structures in defining appropriate bargaining units. **UD #64S-74**

"Under both statute and regulations one thing is clear. The board makes unit determinations and the employees, under rules laid down by the board, make representation determinations. The two processes and the roles of the board and the employees are clearly intended to be discrete under the statute, and the regulations purport to carry out that intent." **DC #22-77District Court (1978)**

"Board of Personnel Appeals jurisdiction and authority in this matter is derived from sections **39-31-103(1)** and **39-31-202 MCA**." **UD #2-80**

See also **UDs #18-77, #18-78, and #1-79**.

"39-31-202 MCA provides that the Board of Personnel Appeals *shall* decide the unit appropriate for collective bargaining purposes. The language is mandatory. Other than agreement between the parties to the bargaining agreement no other statutory scheme exists to determine appropriate bargaining units nor is there any statutory scheme that gives the Courts the ability to determine bargaining units except through judicial review subsequent to Board action. That has not occurred in this case." **ULP #54-89.**

See also **UDs #5-89, #7-89, and #16-89** and **UC #5-88**.

33.2: Standards for Unit Determination

"[I]n accordance with **MAC 34-3.8(10)-S8070(8)(a)** the Board dispensed with a hearing on the proposed unit and issued a 'Determination of Appropriate Unit' on 15 April 1974. The order was signed by the then Chairman of the Board…. The above order was in accordance with the Board's policy of 'non-interference' if labor and management agree on the appropriateness of a unit. The Board's Rules and Regulations also allow for future modification (**MAC 24-3.8(10)-S8089**). The above order was issued per the employer-union agreement, not per the result of a formal unit determination hearing." **UM #2-75**

This Board will decide in each case the unit appropriate for modification for the purposes of collective bargaining. In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering public employment peace and stability through collective bargaining." **UM #2-75**

"The purpose of unit determination, either by agreement or hearing, is to create a stable bargaining unit, to avoid confusion and misunderstanding about the scope of a unit and therefore avoid subsequent conflicts which may lead to disruptions of meaningful collective bargaining and good labor relations." **UM #2-75**

33.21: Standards for Unit Determination – Appropriate Unit [See also 31.47 and 33.3.]

Even though new union (Montana Public Employees Association) based authorization cases on three different units while old union (AFSCME) had grouped all employees into one unit, the Board of Personnel Appeals allowed the unit to remain the same since the employer offered no objection. **UD #9-74**

Employees of a state agency based in several counties may determine by county-wide elections their bargaining agent. The result of this ruling is that a state agency may have employees represented in two or more bargaining units. **UD #10C-74**

List of inclusions and exclusions by classification submitted by intervenor was accepted by Hearing Examiner as further defining unit. **UD #36-74**

Electrical inspector included in unit represented by Plumbers and Pipe Fitters over objection of city which claimed that there should be two units since different crafts were involved. **UD #49-74**

Faculty at Northern Montana College determined to be an appropriate bargaining unit although system-wide unit might be more appropriate. Unit established in response to wishes of all three labor organizations and faculty. **UD #55S-74**.

"Determining an appropriate unit is a major first step in removing conflicts." **UM #2-75**

"In resolving the unit issue, the Board's primary concern is to group together only employees who share a substantial community of interest. It is not the Board's policy to compel labor organizations to represent the most comprehensive grouping." **UM #2-75**

"In looking at National Labor Relations Act precedents I find Section 9(c) (5) provides that 'in determining whether a unit is appropriate the extent to which the employees have organized shall not be controlling'." **UM #2-75**

"The Montana legislature clearly authorized the Board of Personnel Appeals as the agency to establish appropriate bargaining units for public employees when it enacted section **39-31-202, MCA**: 'In order to assure employees the fullest

freedom in exercising the rights guaranteed by this chapter, the Board or an agent of the Board shall decide the unit appropriate for the purpose of collective bargaining…'." **UC #1-77 Montana Supreme Court (1982).** See also **UM #2-75.**

Section **59-1606** discusses the Board of Personnel Appeals' responsibility for deciding the appropriate unit and the factors it must consider in making such a determination. **UD #18-77**

"The rules and regulations of the Board [of Personnel Appeals], **ARM 24-3.8(10)-S8000(1)**, provide that a unit my consist of all the employees of the employer, any department, division, bureau, section, or combination thereof if found to be appropriate by the Board." **UD #18-77**

"A change in administration or a change in personnel, in itself, is not a factor in determining an appropriate bargaining unit." **UD #18-77**

"[A]s was reasoned by the U.S. Supreme Court in **NLRB v. Atkins & Co. … (1974),** '…the Board in performing and applying these terms ["employee" and "employer"] must bring to its task an appreciation of economic realities, as well as *a recognition of the aims which Congress sought to achieve by this statute*. This does not mean that it should disregard the technical and traditional concepts of "employer" and "employee." But it is not confined to those concepts. It is free to take account of the more relevant economical and statutory considerations….' (Emphasis added)" **UC #4-79**

"The issue in this matter is not to determine the appropriate unit but, instead, we must determine the existing unit." **DC #2-81**

"In Morand Brothers the National Labor Relations Board stated that an 'appropriate unit' need not be the only appropriate unit. The unit as determined must be appropriate to ensure the affected employees ' in each case, the fullest freedom in exercising rights guaranteed by this Act.' The standard applied—an appropriate unit—is very broad. The purpose is, as stated, to assure employees the fullest freedom in exercising their rights to collectively bargain." **UD #1-82**

"[W]here the two sections [**39-31-103 MCA** (excluding supervisory employees and management officials) and **39-31-109 MCA** (grandfathering in existing units)] come into conflict, the conflict must be settled in view of the removing certain recognized sources of strife and unrest, it is the policy of the State of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." **UC #2-83**

"[I]t has long been this board's policy in any representation proceeding to afford employees covered by the Act the opportunity to bargain collectively unless some overriding or compelling reason demands their exclusion." **UC #8-79**

See also **UDs #1-74, #11-74, #13-74, #17-74, #29-74, #39-74, #42-74, #50-74, #53-74, #56S-74, #65C-74, #1-75, #43-75, #17-77, #22-78, #24-78, #4-79, #6-79, #7-79, #9-79, #18-79, #24-79, #26-79, #27-79, and #29-79**.

"[I]n order to assure employees the fullest freedom in exercising their collective bargaining rights, the Board of Personnel Appeals has authority to determine the unit appropriate for collective bargaining taking into consideration such factors as community of interest, wages, hours, etc. **39-31-202 MCA**." **UD #20-85**.

See also **UCs #2-88 and #12-88**.

"The Toole/Glacier county case referred to by the Teamsters [***Teamsters Local 23 v. Department of Highways, AFSCME and Board of Personnel Appeals, 24 April 1979****) arising from* ***DC #5-75***] did not determine the appropriateness of a bargaining unit for purposes of a decertification proceeding. The court specifically stated in its conclusions that the issue before it was enforcement of a collective bargaining agreement, not an appeal from a decision of the Board of Personnel Appeals." **DC #19-85**.

"The appropriate unit for a [decertification] election is the unit previously certified by the NLRB or recognized by the employer." **DC #19-85**.

"[D]id MPEA show that the unit originally certified by the Board [the wall to wall non-maintenance unit] was no longer appropriate under **39-31-202 MCA**. The answer is no. The facts adduced at the time of the hearing fail to show a substantial change in the unit and in GVW specifically since the original unit determination." **UC #2-88**.

"Section **39-31-103(11) MCA** defines 'appropriate unit' as a group of public employees banded together for collective bargaining purposes as designated by the Board (Personnel Appeals). The National Labor Relations Board has offered this construction of the meaning of the term 'appropriate': 'There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'. It must be appropriate to ensure the employees *in each case* "the fullest freedom in exercising the rights guaranteed by this Act". ... [The term] carries with it no overtones of the exclusive or the ultimate or the superlative.' ***Morand Brothers*****, 91 NLRB 409, 26 LRRM 1501 (1950)**." **UD #5-89**.

See also **UDs #7-89 and #16-89**.

"The NLRB later said: 'It has not been the Board's policy to compel labor organizations to represent the most comprehensive grouping. It is clear that...a unit of less than all employees may be appropriate.... a union is not required to seek representation in the largest possible unit. Therefore, the crucial question in each case is whether the unit sought is appropriate, and the Act requires the Board to make unit determinations which will "assure to employees the fullest freedom in exercise in the rights guaranteed by this Act".' ***Vallentine Packing Company, Inc.*, 132 NLRB 175, 48 LRRM 1451, August 10, 1961**." **UD #16-89**.

Related to the appropriate unit: "A labor law text contains the following: '...The unit is comprised of jobs or job classifications and not of the particular persons working at those jobs at any given time. The bargaining unit does not change simply because machinist Jones retires and is replaced by machinist Williams.... What is commonly known as the 'appropriate bargaining unit' might more accurately be denoted the appropriate *election* unit....' Robert A. Gorman, *Basic Text on Labor Law*, West Publishing Company, St. Paul 1976." **UDs #7-89 and #16-89**.

"Section **39-31-202 MCA** requires that the Board of Personnel Appeals consider certain factors when determining an appropriate bargaining unit. In making that determination the Board of Personnel Appeals must apply those factors to conditions as they exist at the time of the petition. It would be impossible for the Board to consider and evaluate conditions that do not exist.... If the parties determine that the job duties of particular employees evolve as was predicted during the hearing, such changes can be dealt with through the use of a unit clarification petition." **UD #7-89**.

See also **UD #12-88** and **UCs #5-88, #6-89, and #3-91**.

33.22: Standards for Unit Determination – Most Appropriate Unit

"[I]t is not the function of this Board to determine the most acceptable bargaining unit, only an acceptable bargaining unit." **DR #2-76**

See also **UDs #11-77 and #5-80**.

"[T]his Board, like the National Labor Relations Board, has never set itself the impossible task of determining *the* appropriate unit but recognizes that in any given situation there may be a number of combinations which would result in different units appropriate, to one degree or another, for collective bargaining. . . ." **UD #1-86**.

"The board of directors of the Support Services Division wants a separate bargaining unit. . . The AFSCME and the . . . Association want to add the

Division's employees to the existing City police bargaining unit. A consideration of all the factors listed in section **39-31-202, MCA**, except employees' desires, renders either proposed bargaining unit appropriate. . . . [The] appropriate unit for purposes of collective bargaining for nonexempt employees of the Support Services Division [is] the unit presently comprised of all City of Helena police officers and dispatchers." **EP #1-86**.

See also **UC #2-88**.

33.3: Criteria [See also 33.21.]

"Section **59-1606(2)** … sets forth certain factors which must be considered in deciding the appropriate unit for the purpose of collective bargaining…" **UD #8-77**

All of the criteria mandated for consideration by the act do not have to be met by all employees in a proposed unit….[That is] seldom … to be found." **UD #8-77**

"Our collective bargaining statute, **39-31-202 MCA**, requires the Board of Personnel Appeals or its agent to consider certain factors in deciding the appropriate unit for purposes of collective bargaining by public employees. Those factors are: (1) community of interest, (2) wages, (3) hours, (4) fringe benefits and other working conditions, (5) the history of collective bargaining, (6) common supervision, (7)common personnel policies, (8) extent of integration of work functions and interchange among employees affected, and (9) desires of the employees." **UC #4-80**

See also **UDs #15-76, #18-76, #18-77, #24-78, and #9-83**.

"In addition to community of interest itself, other factors such as wages, hours, fringe benefits, working conditions, history of bargaining, common supervision, common personnel policies, integration of work functions, interchange among the employees and the desire of the employees are to be considered." **UDs #4-85 and #15-87.**

See **UD #1-86 and UC #5-88**.

33.31: Criteria – Historical Considerations

"The extent of the Legislature in not allowing the new legislation to affect existing bargaining units and historical bargaining patterns is to maintain the status quo which the parties to the agreement have found workable in the past. This, of course, would prevent any disruption of the relationship that existed between the parties up to the passage of the legislation." **UC #1-77**

"In **UD #5-74**, the Board of Personnel Appeals found an appropriate bargaining unit to be all LPNs and aides employed by Liberty county Nursing Home and Hospital. Aside from some different faces in various positions, there have been no changes in the administrative structure or the duties and responsibilities of the positions have changed since that time." **UD #4-79**

"[I]t was found that a bargaining unit existed which included the Lieutenants. The Employer sought to change the status quo by requesting that the Lieutenants be excluded. By this action, the Employer is assuming the burden of proof." **UD #7-79**

33.311: Criteria – Historical Considerations – Bargaining History

Section **59-1606(2) RCM 1946** prohibits employees who are included in a larger bargaining unit which is already in existence from altering or fragmenting that unit structure by petitioning to organize under a different union. **UD #2-74**

"This Board is loath to disturb existing units, whether established by agreement or by certification, when bargaining in those units has been successful over a period of time. However, this does not preclude correction of errors or alteration of units to adjust to changed circumstances." **UM #2-75**

"[T]he test to be applied when determining the appropriate inclusion or exclusion of supervisory and/or managerial positions in grandfathered units speaks of actual substantial conflicts…. The requirement for the demonstration of actual substantial conflict is obvious: past experience is a far more reliable gauge or probability more mere speculation." **UC #1-77**

"No information in this matter indicates that there is a history of collective, rather than individual bargaining between [Adrella and LeRoy Baker (bus drivers, cook and custodian)] and the school district. Therefore, the bargaining history does not preclude their inclusion in the proposed unit." See Section **39-31-202 MCA** related to "the history of collective bargaining" **UD #6-79**

See also **UD #9-74**.

"Furthermore, the facts of the Toole/Glacier case [***Teamsters Local 23 v. Department of Highways, AFSCME and Board of Personnel Appeals*, (24 April 1979)** arising from **DC #5-75**] were different than the facts in evidence here. . . [That case] showed that the employees in both Toole County and Glacier County had not been represented by a union for several years. . . . [There is] ample evidence to show that AFSCME and the Department of Highways have negotiated and administered their contracts covering highway maintenance employees on a single-unit, statewide basis." **DC #19-85.**

"The NLRB has been hesitant to disturb existing, stable bargaining relationships where such relationships have existed and there is reasonable expectation of continued stability in the unit." **DC #19-85.**

"Any similarity between the school nurse position and the non-certified employees relating to the history of collective bargaining ended when the unit of non-certified employees was designated a collective bargaining unit by this Board." **UC #5-86**.

"The weight given to particular bargaining history factor for inclusion/exclusion in bargaining units is often determinative of community of interest. ***Dallas Morning News*, 285 NLRB No. 106, 126 LRRM 1346 (1987)**." **UC #21-92**.

See also **UC #3-91**.

33.313: Criteria – Historical Considerations – Prior Contract

The Board finds "that the provisions of Section **59-1615, RCM, 1947**, anticipated this problem [of disavowing recognition of a unit after the expiration of the contract] and gave continuing protection to those employees, whether supervisory or not, who were recognized prior to the effective date of the Act…. The Board finds that this grandfather clause applies to the recognition of the bargaining agent as well as the ratification of existing bargaining agreements." **ULP #2-73**

"[A] bargaining unit composed of all maintenancemen I, II, III, IV, V, VI, and maintenance supervisor I's represented by AFSCME In the state of Montana presently exists [from a contract executed between AFSCME and the Montana Highway Department in 1970 which was still in effect at the time of the hearing]… [T]he so-called 'grandfather clause' of the Public Employees Collective Bargaining Act requires us to recognize this contract, in spite of its age, because it was in existence prior to July 1, 1973, the effective date of the act." **UD #39-74**

Two "butcher-supervisors" were excluded from units on the grounds that they are covered under a prior contract with AFSCME. **UD #42-75**

"The City of Billings has recognized [Firefighters] Local #521 since 1968. The bargaining agreement reflects that in its 'recognition clause.' Therefore, by recognizing the agreement, the City recognizes the Unit. The Unit does not cease to exist when the agreement ends. The Unit continues to exist until a new Unit is formed and recognized." **UC #1-77 Montana Supreme Court (1982)**

" The Board of Personnel Appeals has … consistently held that individual contracts may not interfere with the collective bargaining process…. [T]he right

to collectively bargain is paramount to any effect individual contracts might have." **UD #6-79**

"The Board of Personnel Appeals argues that at change of exclusive representation nullifies the applicability of the grandfather clause as to preserving the unit. The Board argues that the term 'recognized,' in its technical labor vernacular, applies only to representatives and it therefore follows that, because units are not 'recognized,' the legislature did not intend to preserve units by enacting the grandfather clause. This interpretation of the law is rational." **UC #6-80 Montana Supreme Court (1985)**

"This Board, in **Montana Public Employees Association v. Department of Administration, Labor Relations Bureau, UC #6-80 (1981)**, decided that the grandfather clause has no application when there has been a change of exclusive representative in a grandfathered bargaining unit." **UC #2-83**

"Although the Teamsters Union did not appear as the exclusive representative in the parties' contract until July 1, 1973 [the day the Collective Bargaining for Public Employees Act became effective], the District had in fact recognized it as such prior to that time. Such de facto recognition cannot be ignored nor can the grandfathered clause be held to be inapplicable." **UC #2-83**

"Section **39-31-109 MCA**, the grandfather clause, is applicable in this case. The positions in question are supervisory as that term is used in Section **39-31-103(2)(b) MCA.** There is no actual substantial conflict within the bargaining unit as it presently exists…. Since there is no actual substantial conflict within the bargaining unit as it exists, the petition to declare it inappropriate is dismissed." **UC #2-83**

See also **UDs #67S-74 and #22-75**.

33.32: Criteria – Unit Size

"The Board's practice regarding the minimal size of a bargaining unit bas been to hold that the intent of the Act was for 'collective' bargaining, and that a unit of one was inappropriate because it was not collective." **UD #1-82**

"The employer did not demonstrate any overriding concerns that would dictate two units." **UD #6-88**.

33.321: Unit Size – Accretion

"No contention whatsoever having been made that the accretion [the incorporation of the Alcoholic Counselors into the already existing bargaining unit at Galen] was improper, the Board of Personnel Appeals tacitly acknowledged that the Alcoholic Counselors were indeed a subdivision of the

already existing bargaining unit…. The fact that the employees later decided that they did not want to be incorporated into the already existing bargaining unit, but rather wished to have their own bargaining unit, must be interpreted as a change of mind, not a change of circumstance…. [S]uch change of mind on the employees' part does not constitute as unusual circumstance which would warrant suspension of the election bar rule…." **UD #11-77**

33.322: Criteria – Unit Size – Expansion

Bargaining unit size adjusted by mutual consent at time of hearing. **UDs #35-74 and #63S-74.**

33.323: Criteria – Unit Size – Fragmentation – Proliferation [See also 37.11.]

"The degree of collective bargaining organization the Board presently observes in the county welfare departments indicates, that in order to insure an efficient negotiating relationship between the employer and the employee representatives, the appropriate Board action would involve modification of the existing unit structure…. [The Hearing Examiner then determined the] appropriate units for collective bargaining purposes are: One unit for all county welfare departments the employees of which express a desire to be members of AFSCME; one unit for all county welfare departments the employees of which express a desire to be members of MPEA; and such additional units as correspond to the number of other labor organizations selected by employees in individual county welfare departments." **UD #10C-74**

"To allow the partial disestablishment or decertification of bargaining units [from state-wide to division-sized units] could result in extreme fragmentation and could destroy the very fabric of a stable labor relations process." **UD #39-74**

Both petitioning unit (MPEA) and intervenor (AFSCME) favored a bargaining unit composed of only employees of the Division of Rehabilitative Services in the Department of Social and Rehabilitation Services, but SRS filed a counter-petition and such a unit was deemed inappropriate because all SRS employees are on the same classification and salary plan and Rehabilitative Services is only one of the eight divisions. To avoid fragmentation which would damage the department's ability and effectiveness, it was ruled that the appropriate bargaining unit was "all non-exempt employees of the Department of Rehabilitative Services, excluding employees in county welfare departments." **UD #42-74**

"Petitioners seek to decertify a part of an established bargaining unit. Such a procedure is contrary to the well recognized rule against partial disestablishment and fragmentation of a bargaining unit. Such a procedure, if allowed, would promote, not prevent strife, unrest and instability within the collective bargaining area." **DC #5-75**

"The hearing examiner was in error in deciding that this Board's present rules established a procedure for partial decertification of an existing bargaining unit." Subsections (e)(ii) and (f) of Regulation **24.3.8(14)-S8090(1)** – the present rule on decertification—"refer to 'the unit' meaning the entire certified or recognized bargaining unit." **DR #1-76**

"The NLRB devised a 'basic six unit structure' guideline to formulate bargaining units in health care institutions to guard against fragmentation …. The divisions … excluding guards, are: (1) physicians; (2) registered nurses; (3) other professionals; (4) technical employees; (5) business office clericals; and (6) service and maintenance employees." **UD #24-78**. See also **UD #5-80**.

"One all-inclusive unit would be contrary to the guidelines established, however, six separate units would threaten the collective bargaining rights of the employees [because the units would be so small]…. In view of the foregoing, the community of interest shown between the LPNs and aides, and the 2 NLRB cases cited earlier, a collective bargaining unit consisting of LPNs and aides would be proper." **UD #24-78**

"[T]he employer will usually favor a large unit in order to prevent a proliferation of small units. The union usually wants a smaller unit because it can be more readily organized and managed…. The size of the unit determined goes to the heart of our system and has a pervasive impact upon employer-employee relations ….[In] many cases … [it] will determine whether there will be an election, since the labor organization must make a showing of interest." **UD #1-80**

The Hearing Examiner dismissed the MPEA's petition to represent cooks and food service workers at Eastmont Human Services Center and ruled that the proposed unit was inappropriate. He placed considerable emphasis on the private sector's "basic six unit structure." He noted that "the Collective Bargaining Act for Public Employees makes absolutely no provision for the consideration of state travel policy, travel distance or energy demands as factors in the determination of appropriate bargaining units." The Hearing Examiner held that the petitioned for cooks and food service workers comprised only a portion of the unit labeled "service and maintenance employees." The Board's Final Order remanded the matter to the Hearing Examiner to specifically reconsider the decision in light of statutory (i.e. Collective Bargaining Act for Public Employees) criteria for determining bargaining units. Before the Final Order, MPEA had petitioned for all maintenance workers, custodial workers, food service workers and cooks at Eastmont, and the Employer agreed with the newly filed petition. After the Final Order, both parties jointly requested that further proceedings on **UD #5-80** be discontinued. The Final Order was subsequently rendered moot. **UD #5-80**

This Board has adopted a policy which is consistent with the National Labor Relations Board in denying attempts at partial decertification of recognized or certified bargaining units." **DC #2-81**

See also **UDs #2-74, #39-74, #53-74, and #36-75**; **UM #3-77**; **DCs #2-75, #6-76, #12-77, #4-78, #3-79, and #4-79.**

"This action, UD No. 20-85, represents an attempt at a partial decertification of the existing IBEW bargaining unit to form a smaller unit comprise d of two elevator repairmen which then would be represented by the International Union of Elevator Constructors. . . . [T]his Board has consistently from its beginning to as recently as January of 1986 ruled that partial decertification of an existing bargaining unit is not allowable under the Act. . . . There is nothing in the facts of this case warranting a deviation by the Board from its precedent on this issue. . . . Unit Determination No. 20-85 [is] dismissed on the grounds that it is an attempted part ial decertification of an existing bargaining unit, and therefore, it is an inappropriate action, and also and separately such action is hereby denied by the Board." **UD #20-85.**

33.332: Criteria – Type of Employment – Job Description

See **UD #53-74**.

33.333: Criteria – Type of Employment – Work Activities

"The facts in **Decertification #5-75** differ from those in this present case only with the description of the unit desiring decertification. In **Decertification #5-75**, the unit petitioned for was based upon geographic location. In this present case, the unit was based upon certain classifications of employees and union affiliations." **DC #2-81**

See **UDs #11-74, #29-74, #1-75** and **UM #1-75**.

33.335: Criteria – Type of Employment – Education – Prior Training

See **UM #1-75**.

33.336: Criteria – Type of Employment – Professional Status [See also 34.4]

The academic rank of university or college faculty were determined to be those categories listed on the back of the Regents' contracts. Thus, "Lecturer" is included. **UD #66S-74**

"[T]he faculty members of the College of Engineering who are not registered engineers or engineers in training have a community of interest with those faculty members of the College of Engineering excluded [by Section **59-1602(2)**

because they are professional engineers and engineers in training]….” The nonexempted faculty members also have a community of interest with the other faculty of Montana State University. Therefore, “the determining factor on whether or not the nonexempt faculty members of the College of Engineering should be included in the appropriate bargaining unit for the purpose of collective bargaining shall be the desire of the nonexempt faculty member.” **UD #11-76**

“Although the National Labor Relations Board is prohibited from placing professional employees in the same unit with non-professionals unless they, the professionals, desire to be in the same unit, our act contains no such prohibition. This Board’s practice has long been to include both in the same unit, if they have a sufficient mutuality of interest with other employees.” **UC #4-79**

See also **UD #9-83**.

See **UD #5-89**.

33.34: Criteria – Community of Interest

“Substitute teachers, homebound teachers, summer school teachers, curriculum workers, and other part time teachers … share a community of interest with other employees of the bargaining unit. They perform common work tasks. The part time employees are involved in the teaching of students and, in the case of the curriculum worker, the revision of curriculums, as are other in the case of the curriculum worker, the revision of curriculums, as are other bargaining unit employees. Both the part time and other bargaining unit employees possess similar educational backgrounds. They are supervised by the same personnel. For the most part, they work in the same physical plants. A large degree of interchange exists between the part time and other employees of the bargaining unit. Likewise, their work functions are integrated. These factors … outweigh such factors as difference in the wage and benefit programs and time worked between the part time employees and other employees of the bargaining unit.” **UM #1-75**

“[T]he two employees do have special and distinct interests, which outweigh and override the community of interest shared with other city employees. In these circumstances it would result in creating a frictional mold where the parties would be required to force their bargaining relationship.” **UM #2-75**

“[T]he distinction between academic and nonacademic is a sufficient criteria on which to base the membership of this bargaining unit.” **DR #2-76**

“[I]f it can be shown that a certain group of employees has a greater community or mutuality of interest in wages, hours, working conditions, etc., than any other

group of employees, then the appropriate unit for the purpose of collective bargaining is that group with the greater common interest. It makes no difference whether the unit is one proposed by any of the parties to the formal unit determination hearing…. The Act requires that the Board determine the appropriate unit; it does not require that it accept units as proposed by one of the adversaries." **UD #18-77**

"The NLRB has interpreted common interest among employees to include similarity of duties, similarity of wages, hours and working conditions, similarity of fringe benefits and common supervision." **UD #18-77**

Ardella and LeRoy Baker (bus drivers, cook and custodian) "perform work that is basically similar to that of other employees…." They are not independent contractors, as the School District contends. **UD #6-79**

"No problem, conflict, or compelling reason of record existed to warrant the exclusion of these six faculty members from the unit." **UC #8-79**

"The wages, hours, fringe benefits, working conditions, history or collective bargaining, supervision, personnel policies and qualifications are the same for regional services personnel as for other employee-teachers in the Deer Lodge Elementary School District…. They have a community of interest with other members of the Montana Education Association bargaining unit of which they already belong." **UD #9-79**

"[T]his hearing examiner is concerned that the interests of these employees are not so similar to those of the other members of the unit as to facilitate a workable collective bargaining relationship." **UD #2-80**

"[B]ecause of the greater mutuality of interest between the Communications Center employees and other civilian employees represented by the Teamsters with respect to wages, hours, working conditions, fringe benefits and interchange of employees, I conclude they more appropriately belong in the [large, organization-wide bargaining unit represented by] the Teamsters [than in the unit represented by the Firefighters]." **UC #4-80**

"Non-certified employees in the Poplar School District share a number of working conditions…. However, there are many things they do not have in common: they generally work in different locations, they do different types of work with different educational and training requirements, they work different hours … there is little integration of work functions…. Further, the work sites are so spread out that there is little opportunity for interchange among employees performing these diverse types of work…. On balance there are more differences between the groups of non-certified employees than there are similarities. Consequently, we must conclude that the appropriate unit in this case is one composed of only the custodians." **UD #6-81**

"If I approve the bargaining unit management proposed at the hearing, the possibility of the conflict would only increase. Therefore, one collective bargaining unit among the employees would decrease any conflict." **UD #12-81**

"Determining a 'community of interest' entails the assessment of the overall interests, working conditions, and employment similarities of employees so that members of the same bargaining unit may effectively bargain conditions of their employment. Not surprisingly, in weighing all the factors which must be considered in establishing an appropriate unit, some factors are likely to indicate sufficient community of interest, while some may point to a contrary result…. Sufficient community of interest does exist between the clerical and planning employees of the Flathead Regional Development office to include them in the same bargaining unit." **UD #1-82**

"The Board in making unit determinations seeks an employee group which is united by its common interests and which neither embraces employees having a substantial conflict of economic interest nor omits employees sharing a unit of economic interest. An examination of the facts of the instant case compels the conclusion that the unit should not be limited to those persons with a master's degree or higher degree." **UD #9-80**.

See also **UDs #42-74, #11-76, #21-77, #24-78, and #1-80**.

"[W]e find that Teacher and Library Aides who provide general assistance to a general group of students do not share a similarity of work function and a general community of interest with Bus Aides ad Crossing Attendants or with Teacher Assistants, Home-School Coordinators and Tutors who all supply particular assistance to an individual student or to special groups of students. Limiting the bargaining unit to Teacher and Library Aides will assure all these employees the fullest freedom in exercising their rights guaranteed under section **39-31-202 MCA**." **UD #1-86**.

"Section **39-31-202 MCA** directs the Board of Personnel Appeals to consider certain factors when determining whether employees have a sufficient community of interest with other employees to be placed in the same bargaining unit." **UDs #4-85 and #15-87**.

"The source of funds in this case does not affect the community of interest the four employees in question have with other employees whose pay is funded from a different source." **UD #4-85**.

"The fact that there is some interchange among employees (part-time faculty sometimes teach non-credit community education courses) does not solidify a community of interest between part-time faculty and community education instructors. Their work for different divisions within the employer/counter

petitioner's organization and the lack of common supervision overrides any limited interchange that exists. See ***B. Siegel Company v. NLRB*, 109 LRRM 2843, 6 CA 1982; *J. Ray Mc Dermott and Company, Inc.*, 240 NLRB 87, 100 LRRM 1401, February 23. 1979**." **UD #16-89.**

"As the NLRB has recognized, individual divisions of the same employer may be in different units provided that each division has a degree of autonomy and independence; transfers and interchange of employees between the divisions is negligible; employees in the division are in the same geographical area; and tasks performed under a basic job classification are adapted to the needs of the local facility, ***Catholic Community Services*, 106 LRRM 1255**. Such is the case at the Detention Facility." **UC #12-88**.

"The mere fact that a certain Missoula County High School District employee's wages are paid with non-district funds does not void their community of interest with employees pa id wages from the School District's general fund. See **UD 4-85**, ***Montana Federation of Teachers, AFT, AFL-CIO v. Flathead Valley Community College*, August 22, 1985; *Catholic Community Services v. District 1199,* 254 NLRB No. 90, January 26, 1981, 106 LRRM 125 5; *NLRB v. Columbus Hi, Inc.*, 1 LRRM 2342, 1981 CA 6, 652 F.2d 614**." **UD #7-89**.

"The mere fact that all of the employees in question work part-time is not sufficient to establish a community of interest. See ***Goddard College*, 216 NLRB 81, 88 LRRM 1228, February 4, 1975; *Kendall College v. NLRB*, 97 LRRM 2878, 7 CA 1978, 570 F.2d 216**." **UD #16-89**.

"Community of interest among employees has, and continues to be, the fundamental factor in determining the appropriateness of bargaining units. ***Brown & Root, Inc.*, 258 NLRB 1002, 108 LRRM 1188 (1981).**" **UCs #3-91 and #21-92**.

33.341: Criteria – Community of Interest – Common Supervision

"If it is found that the County Commissioners [as opposed to the District Court] are the employers of all persons in the unit, then one could only conclude that supervision, in its broadest sense, is common." **UC #4-79**

See also **UDs #1-74 and #18-79**.

33.342: Criteria – Community of Interest – Location of Employment

"[W]hile not expressly deciding the issue, I would entertain serious doubts of the legality of the County Option under the Collective Bargaining Law. Under it there could apparently be limitless and unending changes within a recognized bargaining unit…. contrary to the policies of promoting stability and harmony which are the recognized purposes of the Collective Bargaining Act." **DC #5-75**

"Through the 'County Option provision' referred to here, the Plaintiff and Defendant agreed that its maintenance employees could join a union in any previously unorganized county, or change unions in a previously organized county, through a simple showing that a majority of the maintenance employees in any one county desired to do so. The practice of establishing majority status through the presentation of authorization cards is and has been recognized as valid by the Plaintiff, Defendant and Intervenor AFSCME herein." **DC #5-75 District Court (1979)**

"AFSCME represents highway maintenance employees on a state-wide basis. The employees in the five counties petitioned for by the Teamsters represent only a part of the overall state unit." **DC #19-85.**

"[T]he geographical separation of the Montana State University Cooperative Extension Service field staff is only one factor to be considered in determining their community of interest. See ***Goddard College*, 234 NLRB No. 169, March 2, 1978, 97 LRRM 1398**. The Cooperative Extension Service faculty field staff's remoteness from the Bozeman campus is not fatal to their community of interest, the common fringe benefits, and the common personnel policies they share with the on-campus faculty." **UD #5-89**.

33.343: Criteria – Community of Interest – Similar Wages, Hours, Terms and Conditions of Employment

Part-time teaching faculty (less than 0.5 FTE) were judged not to share a community of interest with full-time faculty. **UD #4-74**

Teaching one-half time or more is not sufficient basis for inclusion in the bargaining unit because the faculty may share a community of interest but be assigned to duties other than teaching. **UD #66S-74**

Community of interest of employees in different departments was ruled sufficient grounds for inclusion in a single bargaining unit. **UD #67S-74**

The Hearing Examiner found "that .5 FTE teaching responsibility [is] an improper criterion to determine an appropriate bargaining unit in this matter." **UD #11-76**

"Both ten- and twelve-month office clerical employees have similar wages, fringe benefits, working conditions, personnel policies, hours and a history of meeting and conferring with a centralized management… In addition … the office clerical workers also have similar duties." **UD #18-77**

"Although one can find a mutuality of interest among both [the Independent Monitoring Unit and the Governor's Employment and Training Council] … in

wages, hours, fringe benefits and other conditions of employment, there are two considerations … which cannot be overlooked.:' the groups do not have common supervision and there is a potential conflict of interest." **UD #18-79**

"Although the number of hours which an employee puts in on the job will not of itself by decisive of inclusion or exclusion, it is an important factor in the total assessment of whether he has the requisite community of interest with other employees." **UD #4-85**.

"All of the part-time employees are subject to the same general personnel policies and they work in the same physical facilities. All work fro 16 to 30 hours per week which plainly is more than sufficient to indicate a community of interest with full-time employees. Some share in fringe benefits, others do not. There is nothing on the record to indicate the seven part-time employees' expectations of permanency of employment is less than that of their full-time counterparts." **UD #4- 85**.

"The Teacher Aides and Library Aides have organized around the low wages which they receive. This economic concern gives them a clear community of interest in the area of wages. In addition, they work similar hours and perform many similar duties. There is no integration of work functions with other employees and there appears to be little or no interchange with other employees in the employer's proposed unit. By themselves, the Library Aides and Teacher Aides are an appropriate unit for collective bargaining." **UD #1-86**.

"Adding employees with substantially higher wages to a unit which is organizing around low salaries would dilute the community of interest of those employees." **UD #1-86**.

"[T]he school nurse position was more similar to those positions in the unit comprised of certified employees in consideration of the factors contained in Section **39-31-202 MCA**." **UC #5-86**.

33.35: Criteria – Conflict of Interest

"The obvious reason for excluding supervisory employees and management officials is that no man 'can serve two masters.' A supervisory employee cannot be loyal to management and to his/her union…. Another reason is the potential of intra-union conflict…. Thus the reason for the Legislature excluding supervisory and managerial employees from the bargaining unit is logical both from management's and labor's position." **UC #1-77**

The Board of Personnel Appeals applies a two-pronged test when considering the question of the inclusion or exclusion of supervisory employees or management officials is grandfathered units. It "adopted this test because it: '…allows for the special consideration that must be given grandfathered units …

but also prevents conflicts that are intended to be avoided by the exclusion of supervisory employees and management officials…'." **UC #1-77**

"Independent Monitoring Unit personnel will be monitoring the activities of the Governor's Employment and Training Council. That relationship in itself is sufficient … to negate positive considerations of a community of interest." **UD #18-79**

"If I approve the bargaining unit management proposed at the hearing the possibility of the conflict would only increase. Therefore, one collective bargaining unit among the employees would decrease any conflict." **UD #12-81**

"The difficult question brought by this matter is the second part of the two part test: is there an actual substantial conflict resulting in the compromise of the interests of any party to its detriment? There are three areas of potential conflict in the fact situation presented here. First there is the intra-unit conflict possibility. Second, there is a possibility for a conflict between this unit and other employee groups represented by different unions. Third, is the possibility of conflict between the bargaining unit and management…. I find no actual substantial conflict which would warrant the dissolution of the entire unit." **UC #2-83**

See also **UD #1-77 Montana Supreme Court (1982).**

33.382: Criteria – Employer Considerations – Employer Structure and Organization

See **UDs #14-74 and #49-74**.

33.39: Criteria – Other Considerations

See **ULP #19-78**.

"[W]ithout actual facts before it, the Board of Personnel Appeals would be unwise to fashion a general conclusion and order on temporary employees. Without knowing the circumstances of employment that affect the several factors related to community of interest, the most the Board could engage in would be speculation. For that reason, this recommended order will address only those issues on which specific facts related to specific positions were placed in evidence." **UD #4-85**.

33.393: Criteria – Other Considerations – Employee Self-Determination

"The effectiveness of the collective bargaining process depends in large part on the coherence of the employees in the unit." **UM #2-75**

"To ignore the expressed desires of ten percent of this unit could hardly be said to assure to employees the fullest freedom in exercising the rights guaranteed by this Act or foster stable labor relations as contemplated by the Public Employees Act." **UM #2-75**

"[T]he determining factor on whether or not the nonexempt faculty members of the College of Engineering should be included in the appropriate bargaining unit for the purpose of collective bargaining shall be the desire of the nonexempt faculty members." **UD #11-76**

"Where … a consideration of the factors listed in the statute indicates that the employees may be placed in a single unit or multiple units, the determining factor should be the desires of the employees." **UD #8-77**

See also **UDs #10C-74 and #55S-74**.

"Under section **39-31-202 MCA** the policy of the state is best promoted by allowing employees' desires considerable weight." **EP #1-86.**

33.41: Exclusion from Unit – Managerial [See also 16.12.]

The Superintendent and the Assistant Superintendent of the School and the Director of Counseling were excluded from the bargaining unit because they perform management functions. Also excluded were the Institutional Teacher and the Registered Nurse. **UD #26-74**

Deans and above are excluded from the bargaining unit because of their management orientation, but the Department chairmen are included in the bargaining unit even though some exercise more supervisory functions than do some deans. Eligibility to participate in faculty governance was used as a criterion for inclusion in the faculty bargaining unit. **UD #67S-74**

"[P]ursuant to national labor policy, … the Montana Act specifically excludes supervisory and management employees from the definition of 'public employee.' Section **39-31-103(2)(b)(iii), MCA**." **UC #6-80 Montana Supreme Court (1985)**

See also **UDs #22-77, #1-79, #4-79, #14-80, and #9-83**; **UCs #1-77 and #2-83**; and **ULP #29-82**.

"[N]one has managerial status. They do not have authority to formulate, to determine or effectuate management policies by the use of discretion. Such authority rests with the center directors and others above them." **UD #15-87**.

See **UD #5-89** and **UC #6-85**.

33.42: Exclusion from Unit – Supervisory [See also 16.32 and 46.92.]

"[T]he employer attempted to show changes in duties and responsibilities of the position over a period of time and here they also stressed the emphasis … placed on reorganization and supervisory responsibilities. I made no findings related to those propositions because the question is whether these employees are supervisors under the Act's definition at the time of the hearing." **UC #7-80**

"There is no supervisory exclusion under the Nurses Collective Bargaining Act, but prior to the time of the hearing the parties voluntarily entered into a stipulation that the unit 'is appropriately comprised of Registered Nurses excluding supervisors. Further, the parties agree that 'supervision' shall be as defined in the Montana Collective Bargaining for Public Employees Act, Section **39-31-103(3), MCA**." **UC #3-79**

"The test to be applied when considering the question of the inclusion or exclusion of supervisory employees or management officials in grandfathered units shall be two pronged: (1) first a determination must be made whether or not the position in question is a supervisory or management official; (2) if the position is determined to be a supervisory or management official then the second question to be answered is whether the inclusion of that position in the unit creates actual substantial conflicts which result in compromising the interests of any party to its detriment. If the inclusion does result is a substantial conflict which results in compromising the interest of any party to its detriment, then the position must be excluded from the unit." **UC #1-77**

See also **UDs #26-74, #61-74, #66S-74, #36-75, #18-76, #24-76, #8-77, #17-77, #21-77, #22-77, #22-78, #24-78, #1-79, #4-79, #7-79, #26-79, #29-79, #32-79, #1-80, #14-80, #23-80, #12-81, #22-81, and #9-83**; **UCs #6-80, #3-83, #5-83, and #2-84; and ULP #2-73, #3-73, and #29-82**.

See **UDs #15-87, #6-88, and #5-89** and **UC #6-85**.

33.43: Exclusion from Unit – Confidential [See also 16.22.]

"[T]here is no basis for exclusion of a 'confidential employee' under the Public Employees Collective Bargaining Act." **UD #18-76**

"[F]rom 1973 to 1979 there was no provision in the [Montana Public Employees Collective Bargaining] Act for confidential exclusions, although the Legislature had previously considered it; therefore … [they] should be construed narrowly." **UD #7-80**

"At the time of the previous unit determination (#18-76), the Act contained no exclusion for confidential employees. However, in 1979 the Act was amended to include an exclusion of confidential employees." **UD #8-83**

See also **UDs #6-74, #25-74, #30-74, #6-75, #6-77, #22-77, #1-79, #4-79, #18-79, #24-79, #27-79, #1-80, and #1-82** and **UC #6-79**.

"Although the Nat ional Labor Relations Act does not exclude confidential employees, the National Labor Relations Board has a long established policy, as expressed in its decisions, of excluding such personnel from coverage." **UD #15-87**.

"In 1979 the Legislature amended the Montana Collective Bargaining for Public Employees act to exclude confidential employees." **UD #7-89**.

See **UDs #6-88, #5-89, and #23-90** and **UC #2-87**.

33.45: Exclusion from Unit – Other [See also 16.4.]

Teachers were excluded by oversight from S.B. 446. The nature of the employer is used to determine which act provides authorization. **UD #54-74**

"A recognition clause which lists certain specified inclusions—position by position—and excludes all others is not the equivalent of a clause which lists certain specified exclusions and includes all others." **ULP #19-78**

See also **UDs #4-74, #13-74, #36-75, #21-77, #24-78, #1-79, #6-79, #26-79, and #7-80**.

"[T]he legislature, when adopting the Montana Collective Bargaining for Public Employees Act, decided that professional engineers and engineers in training are not public employees. See Section **39-31-103 MCA**." **UD #5-89**.